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IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 324

GUY T. HELVERING, Commissioner of Internal Revenue,

Petitioner,

v.

CHARLES E. MITCHELL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MITCHELL

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Dated, January , 1938.

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ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT MITCHELL

Opinions Below

The opinion of the Board of Tax Appeals (R. 79-107) is reported in 32 B. T. A. 1093. The opinion of the Circuit Court of Appeals (R. 442-449) is reported in 89 F. (2d) 873.

Jurisdiction

The judgment of the Court of Appeals was entered on May 17, 1937 (R. 449). The petition for a writ of certiorari was filed August 17, 1937 (R. 450), and granted October 11,

1937 (R. 449). The jurisdiction of this Court is conferred by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented

On April 25, 1933 an indictment was returned against respondent by a grand jury of the District Court of the United States for the Southern District of New York. The first count (the only count here involved) charged that respondent

> "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to-wit, $728,709.84, upon his net income for 1929" (R. 78-79).

The item of $728,709.84 in the indictment is identical with the tax deficiency asserted in this case by petitioner for the year 1929, to which petitioner added $364,354.92 as a fifty per centum fraud penalty (R. 78-79). Does respondent's acquittal bar petitioner from imposing and collecting that fifty per centum addition to the tax deficiency under Section 293(b) of the Revenue Act of 1928?

Statutes and Regulations Involved

Petitioner's brief adequately sets forth the statutes and regulations involved, with the exception of those prescribing the method of assessing and collecting tax deficiencies and penalties. (See Appendix hereof.)

Statement

Petitioner's brief presents a fair statement of the pertinent facts.

The Specification of Errors

Since the Court below did not hold all of Section 293(b) criminal in nature, but only that portion thereof which imposed a fifty per centum addition to the tax, paragraph 2 of petitioner's specification of errors is too broad (Pet. Br. 5).

SUMMARY OF ARGUMENT

I

The fifty per centum fraud penalty of $364,354.92 imposed by petitioner upon respondent pursuant to Section 293(b) of the Revenue Act of 1928 is not a tax but a penalty intended as a punishment for allegedly fraudulent acts. Having once sought unsuccessfully to punish respondent for those acts, the present attempt of the Government to impose such a penalty places respondent in double jeopardy in violation of his constitutional rights.

The decisions of this Court have consistently held that any addition to a tax, whatever it may be called, if designed to punish, is penal in its nature and may not be imposed after an unsuccessful criminal proceeding brought to punish the same acts.

Petitioner's argument that the statute as to the fifty per centum addition was meant to discourage fraud, does not, of itself, exclude such an addition from classification as a punishment. The possible $10,000 fine attending a conviction under Section 146(b) of the Revenue Act of 1928, like the prison sentence, has the same purpose of discouraging fraud, but this does not make the former a tax.

Additions to taxes have been considered by the courts sometimes as penal and sometimes as a mere tax, depending upon the nature and purpose of the particular addition.

II

The judgment of acquittal bars petitioner from seeking a contra determination upon the same acts and transactions. All the acts and intentions essential to the imposition of the fifty per centum addition were put in issue and determined against the government in the criminal trial. There is complete identity of parties and issues in these two proceedings. This case is not to be confused with those in which criminal intent was not involved in the second proceeding and in which plaintiff might recover regardless of the outcome of the prior criminal case. For in the present case the finding of fraud is a prerequisite to the imposition of a fifty per centum penalty.

ARGUMENT

I

The fifty per centum addition is not a tax but a penalty intended for punishment. Its imposition would place respondent in double jeopardy.

A. ***The fifty per centum addition to the tax deficiency is a penalty intended for punishment.***

To justify the imposition of an "additional tax" under Section 293(b) there must be a finding of fraud with intent to evade a tax. Wilful failure to pay a tax is declared by Section 146(b) of the same Act to be a felony punishable by fine and imprisonment. The Court of Appeals held, and its holding is justified by the facts found by the Board of Tax Appeals, that

> "From the indictment and the charge of the court in the criminal prosecution it is clear that the Government relied on the same facts as it relies on in the case at bar to establish fraud" (R. 447).

As fraud presupposes a plan conceived before its execution, it must of necessity be wilful. There can be no act of fraudulent evasion under Section 293(b) that would not also be a wilful evasion under Section 146(b). The penalty prescribed by Section 293(b) is imposed only because of acts which, when committed, constitute a crime. Recognizing this, the Court of Appeals said:

> "But the acquittal of Mitchell under the indictment founded on section 146(b) necessarily involved a finding that he was guilty of no fraud, since fraudulent intent 'to evade or defeat' a tax would necessarily involve the wilful attempt to 'evade or defeat' broadly covered by section 146 (b)" (R. 447).

If the penalty of $364,354.92, sought here to be imposed upon respondent by reason of his alleged fraud, would not be a true tax, but merely a punishment for that fraud, then common sense and precedent alike require a holding that the imposition of such a punishment would constitute double jeopardy.

The fact that the words "tax" or "addition to the deficiency" are used to describe the imposition, or that collection is made through the Bureau of Internal Revenue of the Treasury Department, is of no significance if the real purpose of the imposition is to define and suppress a crime. (*Child Labor Tax Case*, 259 U. S. 20; *Helwig* v. *U. S.*, 188 U. S. 605; *Dorsheimer* v. *U. S.*, 7 Wall. 166.)

Although this Court has not established any mechanical test for distinguishing between taxes and penalties, it has

indicated certain determining factors. For example, an imposition meant for punishment will not be considered in the same light as a true revenue provision whether found in the same or in another act. So also, there is a definite distinction between a heavy penalty imposed in addition to an ordinary tax and because of some wrongful act amounting to a crime, and a mere nominal addition to the tax for failure to file a return on the exact date specified. Even though termed a tax, the assessment is under suspicion of not being a true tax, when levied because of illegal acts. (*United States* v. *La Franca*, 282 U. S. 568.) So, too, if

> "evidence of a crime is essential to the imposition of a tax, the courts do not hesitate to pronounce it a penalty, even if it may incidentally bring in revenue."

(*Regal Drug Corp.* v. *Wardell*, 260 U. S. 386; *Lipke* v. *Lederer*, 259 U. S. 557.) Nor does the fact that the penalty may be superimposed on what is clearly a tax lessen the penal character of the former. (*Helwig* v. *United States*, 188 U. S. 605, 614-616, citing and adopting opinions of the Attorney General to this effect in 4 Ops. Atty. Gen'l. 182, 5 Ops. Atty. Gen'l. 730, and 20 Ops. Atty. Gen'l. 660.)

In 17 Ops. Atty. Gen'l. 433 and in 23 Ops. Atty. Gen'l. 398, the fifty per centum addition provided by Revised Statutes, Section 3176, for neglect or refusal to make a verified return, was said to be a penalty.

Section 293(b) provides that the fifty per centum addition is

> "in lieu of the fifty per centum addition to the tax provided in Section 3176 of the Revised Statutes, as amended."

Thus the penal character of the "addition" is made clear.

A review of the decisions of this Court compels us to the conclusion that (1) if a so-called tax is meant primarily to suppress a certain kind of conduct, rather than to supply regular revenue for the support of the Government, or (2) if the addition is greatly out of proportion to the ordinary tax, or (3) if it is levied upon a particular act because of its fraud, then it is regarded as a penalty and punishment rather than a mere tax. *United States* v. *La Franca,* 282 U. S. 568; *Regal Drug Co.* v. *Wardell,* 260 U. S. 386; *Child Labor Tax* Case, 259 U. S. 20; *Lipke* v. *Lederer,* 259 U. S. 557; *Helwig* v. *United States,* 188 U. S. 605; *Passavant* v. *United States,* 148 U. S. 214; *Wright* v. *Blakeslee,* 101 U. S. 174; *Bartlett* v. *Kane,* 16 How. 263; *Dorsheimer* v. *United States,* 7 Wall. 166.

The conclusion that the fraud penalty provided by Section 293(b) is not a part of an ordinary tax or deficiency is also supported by *Moore Shipbuilding Co.* v. *United States,* 50 F. (2d) 288, wherein the court held that interest on a fifty per centum penalty ran only from the date of the assessment rather than from the date of the deficiency—as would have been the case had the penalty been a part of the tax. The court in justifying that conclusion said (p. 291):

> "* * * The 50 per centum does not relate to income, but is founded solely upon fraud and is not payable by reason of income but by reason of fault. There must be a finding of a false and fraudulent omission whereby the penalty was incurred without which it can neither become due nor be added. Michigan Central R. Co. v. Slack (Circuit Court, Mass.) Fed. Cas. No. 9527.
>
> The requirement that the penalty shall be 'added as part of the tax' means merely that it be assessed and collected as though it were a tax; without this

> provision the Commissioner could not assess and collect the penalty by the summary proceeding of distraint. In the very nature of things, therefore, the reason for the penalty does not exist until the Commissioner has determined that the return was willfully false or fraudulent with intent to evade the tax and the taxpayer is not required to pay it until demand is made."

Let us see how petitioner supports his initial argument that the fifty per centum addition may not be regarded as additional punishment for the crime of which respondent was acquitted. First, he asserts that the legislative history of Section 293(b) shows that Congress intended the fifty per centum addition merely as a civil safeguard for the assessment and collection of revenue, as distinguished from the criminal punishments provided in Section 146(b). But the statutes he cites as showing the development of Sections 293(b) and 146(b) do not, to our way of thinking, show any legislative intent that the penalty provided as an addition to the tax should not be considered as a punishment. A mere continuation of similar provisions in sucessive statutes will not, of itself, indicate an intention not specifically announced for them either by the Congress or the courts. Despite that array of statutes, petitioner has failed to cite any authority supporting his bald statement that the fifty per centum fraud penalty provided by Section 293(b) is not a punishment. Surely if those statutes carried any such intent as is urged by Petitioner, some indication thereof could be found in reported cases or Congressional action. The lack thereof is significant.

Petitioner's second assertion is that the courts have uniformly treated Section 293(b), as well as its statutory

predecessors and similar provisions in internal revenue and customs laws, as entirely civil in effect. But again petitioner's brief discloses no case holding that Section 293(b) is entirely civil in its effect. As to preceding and similar statutes, instead of uniformity of treatment, the courts have given separate consideration to the nature of each so-called tax, and wherever it appeared that the purpose thereof was to punish or prevent acts constituting a crime, they have not hesitated to declare the so-called tax a penalty.

At the outset, petitioner is forced to concede

> "that the addition to the tax imposed by Section 3176 of the Revised Statutes, as amended, was referred to as a penalty in 17 Op. A. G. 433 (1882), and has been so denominated in decisions of the courts" (Pet's. Br., p. 13).

This concession of itself opposes his assertion of uniform treatment. To avoid the effect of this unavoidable concession, petitioner cites *Tayloe* v. *Sandiford,* 7 Wheat. 13, 17, and *Stearns* v. *United States,* 22 Fed Cas. 1188, 1192. The *Tayloe* case involved a "penalty" bond given by one individual to another for completion of certain construction work, and the *Stearns* case involved a penal bond for a prisoner who had failed to observe jail limits. In citing these cases as supporting the proposition that the fifty per centum addition imposed by Section 293(b) is not a punishment, petitioner has gone far afield, for it needs no argument to demonstrate that in law the word "penal" as used in such a bond is not used in relation to punishment for a criminal act.

So too the decided cases holding that "taxes" imposed for the commission of unlawful acts, even though they may be "civil in nature", are likewise penal and punitive, and different from true taxes, of themselves destroy petitioner's argument that there is a long line of judicial decisions treating Section 293(b) and similar provisions as entirely civil in nature. An analysis of these cases shows the reasonableness of placing the fifty per centum addition in the category of a punishment and supports the opinion of the Court below in that regard.

In *Helwig* v. *United States*, 188 U. S. 605, the court was called upon to determine the nature of a "further sum" imposed (under the Customs Administrative Act of 1890, 26 Stat. 131), whenever the appraised value of merchandise exceeded by more than 10% the valuation declared by the importer. The issue was one of jurisdiction, for if the suit to collect the penalty was one arising under "any act providing for revenue, and not being one for penalty or forfeiture", it should have been brought in the Circuit Court; whereas if it was for a "penalty or forfeiture" then, by virtue of a statute in force at that time, exclusive jurisdiction would have been in the District Court. This Court declared for jurisdiction in the District Court in these words (p. 610):

> "The sole question is whether the sum imposed by Section 7, already quoted, is a penalty.
>
> "Without other reference than to the language of the statute itself, we should conclude that the sum imposed therein was a penalty. It is not imposed upon the importation of all goods, but only upon the importer in certain cases which are stated in the statute, and it is clear that the sum is not imposed for any purpose of revenue, but is in addi-

> tion to the duties imposed upon the particular article imported, and in each individual case when the sum is imposed it is based upon the particular act of the importer. That particular act is his undervaluation of the goods imported, and it is without doubt a punishment upon the importer on account of it. Whether the statute defines it in terms as a punishment or penalty is not important, if the nature of the provision itself be of that character. If it be said that the provision operates as a warning to importers to be careful and to be honest, it is a warning which is efficacious only by reason of the resulting imposition of the 'further sum', in addition to the duties, provided for by the statute."

What more apt words could be found to characterize the fifty per centum additional tax here sought to be imposed upon respondent? It is not a tax upon his income. It is a sum based upon a particular act of the taxpayer—his allegedly fraudulent return. If it is meant to aid the collection of revenue by warning other taxpayers to be careful and honest, it is efficacious only by reason of the resulting imposition of the "additional tax in addition to the duties provided for by the statute."

The *Helwig* case reviews in detail various customs acts from 1818 to 1897. It may be fairly said to hold that additional duties imposed because of the commission of fraudulent acts constitute penalties, unless there is a specific expression of a legislative intent that the addition is not to be so regarded. The very factor upon which petitioner relies in his discussion of the *Helwig* case (Pet. Br. p. 20) namely, a specific provision that the additional duties should not be construed as penal, is wholly lacking in the present case. In its absence the usual judicial rule of construction holding such provisions to be penal should be followed.

In *Bartlett* v. *Kane*, 16 How. 263, "additional duties" had been levied upon an importer (under the Tariff Act of 1846, 9 Stat. 43) for undervaluation. The law provided for a refund of duties upon re-exportation, and the regular duties had been returned. The importer, however, claimed that the "additional duties" should also be returned. The court disallowed the claim, and thereof it said (p. 274):

> "An examination of the revenue laws upon the subject of levying additional duties, in consequence of the fact of an undervaluation by the importer, shows that they were exacted as discouragements to fraud, and to prevent efforts by importers to escape the legal rates of duty. In several of the acts, this additional duty has been distributed among officers of the customs upon the same conditions as penalties and forfeitures. As between the United States and the importer, and in reference to the subject of drawback and debenture, it must still be regarded in the light of a penal duty.
>
> "The provision for the return of the duty upon a re-exportation, formed a part of the system of regulations for importation and the revenue from the earliest period of the government, and has always been understood to establish relations between the regular and honest importer and the government.
>
> "It does not include, in its purview, any return of the forfeitures or amercements resulting from illegal or fraudulent dealings on the part of the importer or his agents. Those do not fall within the regular administration of the revenue system, nor does the government comprehend them within its regular estimates of supply. They are the compensation for a violated law, and are designed to operate as checks and restraints upon fraud and injustice."

A like careful differentiation between tax and penalty is found in *Dorsheimer* v. *United States*, 7 Wall. 166. By the Internal Revenue Act of 1864, collectors were authorized to prosecute for the recovery of fines, penalties and forfeitures in the name of the United States. One-half of the amount recovered was to go to the collector or deputy, who should first "inform of the cause, matter or thing whereby such penalty may have been incurred." Information was furnished by Dorsheimer, charging that a distiller, by false returns, had fraudulently withheld taxes in the amount of $195,000. The distiller's property was seized, and forfeiture proceedings begun. Thereafter, the Secretary of the Treasury, on payment of the taxes by a third party intervenor, released the seized property and over the protest of Dorsheimer, accepted a small sum in lieu of penalty.

This court upheld the Secretary's action, saying (p. 173):

> "The purpose of penalties inflicted upon persons who attempt to defraud the revenue, is to enforce the collection of duties and taxes. They act *in terrorem* upon parties whose conscientious scruples are not sufficient to balance their hopes of profit. The offer of a portion of such penalties to the collectors is to stimulate and reward their zeal and industry in detecting fraudulent attempts to evade the payment of duties and taxes."
>
> "As the great object of the act 'to provide internal revenue' is to collect the tax, the Secretary of the Treasury has no power to remit it. When the primary object of collecting the tax is obtained, as in the present case, the further infliction of penalties is submitted entirely to the discretion of the secretary."

Far from holding (as petitioner, by his reference thereto [Pet. Br. pp. 16, 17], would have us infer), that it was one of a long line of cases holding that an addition to a tax was a mere sanction and not a penalty, the decision in the *Dorsheimer* case appears to be based squarely upon the principle that the addition to the tax was a penalty quite apart from the tax itself, and that, therefore, the infliction of this penalty was discretionary with the Secretary.

All of the cases heretofore discussed herein which held the addition to be a penalty or punishment were civil in their nature. In all of them the rules of evidence and of procedure applicable to civil actions were applied, except that the defendant could not be compelled to bear witness against himself (*Lees* v. *United States*, 150 U. S. 476, 480; *Boyd* v. *United States*, 116 U. S. 616). This application of rules of civil procedure included admissibility of evidence (*United States* v. *Zucker*, 161 U. S. 475), also quantum of proof (*United States* v. *Regan*, 232 U. S. 37), and direction of verdicts (*Hepner* v. *United States*, 213 U. S. 103). The penalties provided by the several statutes involved in those cases were either assessed by administrative officials or sued for in a civil action.

Despite the fact that the statutory provisions so enforced were civil in their nature, or at most *quasi criminal* —this term was applied to them in *Boyd* v. *United States*, *supra*, (p. 634)—they were uniformly held to be penalties, *i.e.*, punishment for wrongful conduct. In none of the cases did the fact of adherence to the civil forms of action militate against a determination that the imposition was penal in character. And in each case this holding led to a result that would not have occurred had the court accepted the

claim that the impositions in question were but part of a revenue producing program.

Petitioner would divide penalties into two classes (Pet. Br. pp. 14, 15), (1) penalties for crime such as he claims were involved in *United States* v. *La Franca*, 282 U. S. 568, *Regal Drug Corp.* v. *Wardell*, 260 U. S. 386, *Lipke* v. *Lederer*, 259 U. S. 557, and *Wong Wing* v. *United States*, 163 U. S. 228, and (2) penalties which do not follow as a result of the commission of crime and which petitioner calls "mere sanctions to enforce obligations validly imposed by the Congress." Under this second so-called classification, petitioner cites no cases dealing with additions to income taxes or to customs duties. The only case he refers to is *Oceanic Navigation Co.* v. *Stranahan*, 214 U. S. 320, which involved a penalty against a steamship company for bringing into this country an alien infected with a loathsome or contagious disease. In that case there was no question of the imposition of an additional sum because of the commission of acts tantamount to a crime. In fact, in referring to the power to impose the exaction, this court expressly said:

> "it is apparent that it does not purport to define and punish an infamous crime, or indeed any criminal offense whatever" (p. 337),

The *Stranahan* case neither supports nor furnishes persuasive reasoning for the adoption of petitioner's argument that the addition to the tax involved in this case is not a penalty.

In that case, as well as in *United States* v. *Nash*, 111 Fed. 525, in *Doll* v. *Evans*, 7 Fed. Cas. 855, and in *Clay* v. *Swope*,

38 Fed. 396, there was no question of double jeopardy before the court. The *Stranahan* and the *Nash* cases involved the imposition of penalties for acts not criminal or subject to any other punishment than the civil penalty. *Doll* v. *Evans* and *Clay* v. *Swope* merely permitted a penalty to be collected by distraint.

Neither the method of collection nor the taxpayer's inability to invoke the aid of equity to enjoin collection are determinative of the punitive character of such additions. *Helwig* v. *United States, supra; United States* v. *Chouteau,* 102 U. S. 603; *Dorsheimer* v. *United States, supra.*

This principle was recognized by this court in *United States* v. *Chouteau, supra,* as follows (p. 611):

> "Admitting that the penalty may be recovered in a civil action, as well as by a criminal prosecution, it is still as a punishment for the infraction of the law. The term 'penalty' involves the idea of punishment, and its character is not changed by the mode in which it is inflicted, whether by a civil action or a criminal prosecution."

Petitioner seems to place considerable reliance upon *McDowell* v. *Heiner,* 9 F. (2d) 120, affd. 15 F. (2d) 1015, cert. den. 273 U. S. 759. There an action was brought to enjoin the collection of penalties levied upon (fraudulent) income tax returns, under sections of the 1913 and 1918 income tax acts substantially similar to section 293(b). The court refused to grant injunctive relief against distraint and seizure of the property. In direct contradiction of the idea that the penalty tax there involved was not intended for punishment, the *McDowell* case at least implies that punishment was the main purpose of the fifty per centum penalty there involved. There the court, said (p. 123):

> "The Constitution does not guarantee trial by jury for the imposition of penalties for the non-payment of taxes. None of the constitutional provisions relative to the right of trial by jury have any application here, as the plaintiff is not being tried for a crime. Money penalties may be sued for and recovered in civil actions, and criminal prosecution is not necessary. *Hepner* v. *United States*, 213 U. S. 113, 29 S. Ct. 474, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960."

Although petitioner insists that the method of collecting a penalty determines its character as between the tax and penalty, the decided cases refute this theory. All that was held in the *McDowell* case (and the *Stranahan* case which it followed), was that Congress had power to fix the manner in which the additional levy or the additional penalty was to be collected. On account of the many different actions on account of which Congress may impose penalties, it is to be expected that there might be some differences in the methods prescribed for their collection. Procedural forms, however, cannot control the substantive nature of the penalty itself. Its true character can only be determined from the nature of the action penalized. In the present case, it is clear that the fifty per centum addition results not from any tax calculation but only because of a finding of fraudulent and hence wilful evasion of a tax, and that the fifty per centum addition is wholly penal.

Petitioner concedes (Pet. Br. pp. 14, 15) that penalties which he describes as imposed to punish crime

> "would be barred by an acquittal in a prior criminal prosecution for the crime for which such penalties are a part of the punishment" (Pet. Br. p. 15).

However, nothing is found in any of the four cases referred to by petitioner as illustrating this situation, indicating that the civil penalty there involved might form a part of any criminal sentence consequent on trial and conviction. It would seem therefore that the only contention not closed against petitioner is his primary contention that the fifty per centum addition imposed under Section 293(b) is not a punishment. If he is wrong in this, and if that addition is in the nature of a penalty then, under the cases he relies on, and upon his concession that if this penalty is in the same class as those imposed by Section 35 of the Prohibition Act, it would be barred by an acquittal in a prior criminal prosecution, the judgment of the Court of Appeals must be upheld.

Petitioner's third argument (Pet. Br. pp. 26-30) is that the fifty per centum addition is to compensate the Government for alleged added expense (in the collection of its revenues) occasioned by fraudulent concealment. He intimates that if the penalty is not allowed, taxpayers whose honesty has not been questioned by the Government, will ultimately have to bear the expense of this and similar suits. The maintenance of an adequate tax force is a responsibility of government and the cost thereof should be part of its regularly budgeted expense. No showing has been made that the expenses of the Treasury Department's investigators are or ought to be regularly met from fines and penalties imposed for tax violations.

Petitioner cites *Stockwell* v. *United States*, 13 Wall 531, as authority for the proposition that a statute providing that any person who knowingly receives or conceals illegally imported goods shall be liable in double the value of the goods is "compensatory". No question of double jeopardy

was there presented nor did the Court by using the word "compensatory" mean to detract from the essentially punitive character of the penalty.

The question at issue was merely whether the Act of 1823 imposing the double value payment had been superseded by a purely penal Act of 1866. The Court held in the negative, considering that Congress need not confine itself to one type of punishment but that punishment might be meted out to the wrongdoer either by civil or by criminal proceedings.

Thereof, the Court said (p. 552):

> "But the true question is whether a wrongdoer may not be both civilly and criminally responsible for the same act, and it would not be strange if Congress had given *the option to sue for double values or to prosecute for the crime.*" (Italics ours.)

Had the question of double jeopardy been presented it is probable that the Court, in harmony with the above reasoning, would have squarely held that there must be an election under the option and that both penalties could not be imposed for the same wrong.

Petitioner's fourth argument (Pet. Br. pp. 30-32) is that the fifty per centum addition is in the nature of a special surtax imposed on the basis of fraud. The argument seems to rest upon the statute of 13 Eliz. c. 5 (1570), dealing with conveyances in fraud of creditors. That statute does not deal with taxes or surtaxes. Although petitioner argues that separate treatment for fraud was given in 1570, the pertinency of the argument to the present case is obscure. Certainly he cannot argue that fraud was first discovered or prohibited in that year.

The weakness of this argument is disclosed by the even greater weakness of the analogy upon which petitioner relies for its support, namely, the tax imposed by Section 104 of the Revenue Act of 1928 (formerly Section 220 of the Revenue Acts of 1918, 1921, 1924 and 1926). Such a tax placed upon holding corporations employed to avoid the incidence of large surtaxes upon the individual stockholder is plainly not a special punitive tax upon a crime. The controlling stockholders of a corporation made subject to Section 104 may freely continue the use of a corporate *alter ego* without fear of criminal penalty so long as they pay the rate of tax imposed upon such a corporation. This corporate practice is not made a crime, and no double jeopardy can ever arise by reason of it. The illustration is entirely irrelevant to the issues here involved.

Petitioner's fifth argument (Pet. Br. pp. 32-36) is that a holding that the addition is punitive would cast serious constitutional doubt upon the administrative application of section 293(b) as a civil safeguard for the protection of the revenue. In this argument, petitioner assumes fanciful situations and conjures up fears which have no real substance. If his reference to the Prohibition cases (*Lipke, Regal Drug Corporation,* and *La Franca*) is intended to cast doubt upon the legal right of petitioner to enforce the collection of the ordinary tax and the penalty by administrative action or civil suit, it is groundless for that issue is not involved in this case, and no claim is being made that petitioner lacks such power. Nevertheless, while again stressing the fact that the punitive nature of the penalty is not determined either by the entity selected, or the procedure provided by law to enforce its collection, we find it

necessary, in order to prevent misapprehension, to point out that petitioner's argument that the Government would be forced to proceed by criminal indictment and trial in all fraud cases is unsound. It may proceed either by criminal indictment or by civil action. The only limitation is that after a taxpayer has been once subjected to risk of punishment in a criminal proceeding, he may not be again subjected to that risk for any of the acts that formed the basis of the earlier criminal prosecution.

As a sixth and final argument, petitioner urges that the *Coffey* and the *La Franca* decisions do not control. These decisions will be later discussed in detail.

Contrary to petitioner's assertion that there is a long line of judicial decisions treating Section 293(b) and antecedent and similar provisions as entirely civil in their nature, an examination of those decisions will show that the Courts have held that if a so-called tax is intended less for revenue than to suppress a type of conduct, or if it is imposed because of a fraudulent and illegal act, then the so-called tax is a penalty or punishment.

B. *The constitutional provisions against double jeopardy bar any present imposition of the fifty per centum addition to the tax.*

We come now to consider whether the attempted imposition of such a penalty, after respondent's indictment and acquittal upon the same charges as those made in the effort to collect the penalty, places respondent in double jeopardy.

The Constitution safeguards a man from being twice placed in peril of punishment for one offense. Respondent has anticipated only in one series of wrongful acts, namely,

the filing of an income tax return for 1929, in which he claimed a deduction and omitted a bonus payment. For this conduct respondent was indicted, tried and acquitted. Thereby he was subjected to the risk of punishment by imprisonment and fine. Now petitioner seeks to hold respondent liable not only for the tax upon the deducted and omitted items, but also for a further sum—in effect a fine of $364,354.92 imposed as a punishment for his fraudulent conduct.

The doctrine of double jeopardy does not protect a man from the civil consequence of a criminal act. For example, if a man be convicted of reckless automobile driving and imprisoned or fined therefor, that conviction and punishment does not bar a suit for damages by any person injured, although the injury results from the very act for which the conviction was had. So likewise whether respondent had been acquitted or convicted of fraud in a criminal action the doctrine of double jeopardy would impose no bar on the subsequent assessment of a tax due on the deducted or omitted items. The doctrine of double jeopardy, however, does bar this item of $364,354.92 because it is imposed not as a pure tax but as a further punishment. *Boyd* v. *United States*, 116 U. S. 616.

Thus in *Stone* v. *United States*, 167 U. S. 178, the defendant had been acquitted of the crime of intentionally cutting and removing timber from land belonging to the United States. Subsequently, the Government sued the defendant for the value of the timber so cut and removed. The defendant contended that his prior acquittal was a bar to this suit, and relied upon the *Coffey* case to sustain his contentions. This Court ruling against that contention, said (p. 187):

> "The present action is unlike that against Coffey. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant. The proceeding by libel against Coffey, although civil in form, was penal in its nature, because it sought to have an adjudication of the forfeiture of his property for acts prohibited. It was, as we have seen, a case in which a punishment denounced by statute was sought to be inflicted as a consequence of the existence of facts that were in issue and had been finally determined against the United States in a criminal proceeding."

There the judgment sought in the civil case was obviously not by way of punishment for a criminal act but only to recover the value of its own property which defendant may have innocently and without criminal intention converted to his own use.

In *Murphy* v. *United States*, 272 U. S. 630, the defendants had previously been tried and acquitted of maintaining a nuisance in violation of the Prohibition Act. Subsequently the Government sued in equity to abate the same alleged nuisance. The defendants proved their former acquittal and moved to dismiss. This court, however, held that such acquittal was not a bar to the civil suit for the abatement of the nuisance. In reaching this result the court made it clear that it did not regard the abatement of the nuisance as a punishment for the crime of which the defendants had been previously acquitted. Thereof it said (p. 632):

"It appears to us that the purpose is prevention, not a second punishment that could not be inflicted after acquittal from the first. * * *

"* * * That it did impose a punishment is the only ground on which the former judgment would be a bar."

The Court took particular pains to point out that any detrimental effects of the second proceeding (padlocking for the period of a year the premises whereon the nuisance had been maintained) could be avoided by posting a bond against illegal use of the premises. There, indeed, the only issue in the second civil trial was, did the nuisance in fact exist? If it did, the defendants had no right to continue it and were not being punished by its abatement. No question of criminal intention was involved in the civil suit.

Generally similar are *United States* v. *Warner Brothers Pictures, Inc.*, 13 Fed. Supp. 614, and *United States* v. *Donaldson-Shultz Co.*, 148 Fed. 581. The first of these cases involved a civil action for injunction against a violation of the Sherman Act after the defendants had been acquitted of a criminal charge based thereon; and the second involved an action for injunction against the obstruction of a navigable stream, after acquittal of a criminal charge for violating a statute punishing any such obstruction. In each of these cases the object of the second civil action was not to punish alleged criminal acts of which the defendants had been previously acquitted, but merely to enforce rights possessed by the Government irrespective of any criminal act or intent on the part of the defendants. These cases would be applicable here if this proceeding represented merely an attempt to recover the ordinary tax

without a fifty per centum penalty, in which case, petitioner could well argue that respondent's acquittal did not preclude the enforcement of whatever ordinary tax might be due.

The only cases, pertinent to the question here involved, are those in which the second proceeding is based upon acts penal in character.

In *United States* v. *Chouteau*, 102 U. S. 603, a distiller had been indicted for fraudulent evasion of taxes. A compromise and settlement was made with the Government. Subsequently a suit for penalties was brought. This court held that the settlement of the criminal proceedings barred the second action. Thereof it said (p. 611):

> "Whilst there has been no conviction or judgment in the criminal proceedings against the distiller here, the compromise must on principle have the same effect. The government through its appropriate officers has indicated, under the authority of an act of Congress, the punishment with which it will be satisfied. The offending party has responded to the indication and satisfied the government. It would, therefore, be at variance with right and justice to exact in a new form of action the same penalty. For, as it was justly said by this court in Ex parte Lange, speaking through Mr. Justice Miller, 'If there is anything settled in the jurisprudence of England and America, it is that no man can be twice lawfully punished for the same offense. And, though there have been nice questions in the application of this rule to cases in which the act charged was such as to come within the definition of more than one statutory offence, or to bring the party within the jurisdiction of more than one court, there has never been any doubt of its entire and complete protection of the party where a second punishment is

> proposed in the same court, on the same facts, for the same statutory offence. The principle finds expression in more than one form in the maxims of the common law'."

In *Coffey* v. *United States*, 116 U. S. 436, Coffey had been acquitted on a prior criminal trial. Subsequently the Government brought a proceeding for the forfeiture of certain spirits and property based upon the same acts theretofore asserted to have been criminal. Coffey pleaded his former acquittal as a defense, and the Government demurred. This court held that Coffey's plea was good, saying (p. 444):

> "The judgment of acquittal in the criminal proceeding ascertained that the facts which were the basis of that proceeding, and are the basis of this one, and which are made by the statute the foundation of any punishment, personal or pecuniary, did not exist. This was ascertained once for all, between the United States and the claimant, in the criminal proceeding, so that the facts cannot be again litigated between them, as the basis of any statutory punishment denounced as a consequence of the existence of the facts."

The second *Coffey* action was based upon the same alleged acts and evasions as had been tried in the criminal case. Such is the situation in our case. The *Coffey* case does not stand alone as supporting the doctrine that a second punishment will not be permitted even though sought to be recovered in a civil proceeding.

Petitioner seeks to throw doubt on the present status of the *Coffey* case by reference to *Various Items* v. *United*

States, 282 U. S. 577. This case involved a proceeding to forfeit a distillery on the ground that the operating corporation had conducted its distilling business with intent to defraud the government of tax. The government admitted that prior to this action the corporation had been indicted and convicted along with others for conspiring to violate the statute, upon the same transactions as were set forth as a basis for forfeiture. Petitioner points out that despite this identity of transaction, the action against the corporation for conspiracy was held not to bar the proceeding *in rem* against the distillery. But the *Various Items* case was decided at the same time as the *La Franca* case, *supra*, which applied the doctrine of double jeopardy where a civil penalty for violation of the law was sought to be enforced by an action *in personam* rather than *in rem*. Indeed, in the *Various Items* case the court adverted to its decision in the *La Franca* case and distinguished it so as to completely refute the petitioner's argument here, at least insofar as the present action *in personam* is concerned. Thereof the court said (p. 581):

> "'Nothing can be plainer in legal decision than the proposition that the offence therein defined is attached primarily to the distillery, and the real and personal property used in connection with the same, without any regard whatsoever to the personal misconduct or responsibility of the owner, beyond what necessarily arises from the fact that he leased the property to the distiller, and suffered it to be occupied and used by the lessee as a distillery.'
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> • • • • • • •
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> "A forfeiture proceeding under Rev. Stat. 3257 or 3281, is in rem. It is the property which is pro-

> ceeded against, and, by resort to a legal fiction, held guilty and condemned as though it were conscious instead of inanimate and insentient.* * *"

Petitioner seeks to distinguish *United States* v. *La-Franca, supra,* by arguing that this court there held that the exactions involved were not true taxes but penalties intended as punishment for infraction of the law. To support this alleged distinguishing characteristic it is incumbent upon petitioner to establish that the fifty per centum addition to the tax under Section 293(b) is a true tax. None of the cases cited by petitioner do this, and his argument to that effect is not convincing. In fact, the *La Franca* case would seem a direct refutation, for this court herein said:

> "Of the four items involved, two unmistakably are penalties, and are so denominated. The other two, notwithstanding they are called taxes, are in their nature also penalties."

As to the double jeopardy feature the court said:

> "* * * Respondent already had been convicted and punished in a criminal prosecution for the identical transactions set forth as a basis for recovery in the present action. He could not again, of course, have been prosecuted criminally for the same acts. Does the fact that the second case is a civil action, under the circumstances here disclosed, alter the rule?" (282 U. S. 568, 573).

In holding that it did not, this court cited *United States* v. *Chouteau, supra, United States* v. *McKee,* 4 Dill. 128, and *United States* v. *Gates,* Fed. Cas. 15,191.

Recently, the courts have had to consider the question of double jeopardy in *United States* v. *Glidden Company,*

78 F. (2d) 639; cert. den., 296 U. S. 652. This was a suit by the United States to recover a tax for the diversion of denatured alcohol. Glidden Company plead in bar a prior conviction and fine for conspiracy to violate the Prohibition Act. The court sustained the plea, holding that the suit would place defendant in double jeopardy, and citing *Lipke* v. *Lederer, supra,* and *United States* v. *LaFranca.*

Petitioner would have this court overrule the *Coffey* case if it stands in the way of the imposition of the fifty per centum penalty here sought. He argues that the Government's right to collect its revenue should not be subjected to the uncertainties of a criminal prosecution; and that regardless of the outcome of the latter, it should be privileged to collect its tax and any penalty related thereto. Respondent does not question the Government's right to collect its revenue (*i.e.,* any tax justly due) either before or after a criminal prosecution and regardless of the result of the latter.

Under present statutes Petitioner has available two procedures for the collection of any tax due, and for the imposition of punishment in the event that acts constituting fraud can be proved. Under certain circumstances, the facts may warrant a criminal prosecution. Conviction would inflict punishment and the assessment of any tax due would follow. If acquitted the taxpayer would have been placed in jeopardy. Nevertheless, an assessment and possible collection of tax would not be prevented by the criminal proceeding. But the taxpayer who has been found not guilty under an indictment charging wilful and fraudulent evasion of tax should not a second time be subjected to what in fact is tantamount to a heavy fine,

capable of being imposed only for the same acts for which the taxpayer has already been indicted, tried and acquitted. The collection of Governmental revenue is adequately protected by the statutory remedies available to petitioner. Speaking for this court, in *Lipke* v. *Lederer, supra,* Mr. Justice McReynolds said (p. 562):

> "The guarantees of due process of law and trial by jury are not to be forgotten or disregarded."

Equally the constitutional guarantees against double jeopardy should not be forgotten or diregarded.

II

All the facts and intents requisite to the imposition on respondent of the fifty per centum addition to the deficiency were put in issue and determined against the Government in the criminal trial, and the judgment of acquittal bars petitioner from obtaining a second judgment based upon the same facts and intents.

Identity of parties in this proceeding and in the criminal trial has not been questioned by the petitioner throughout this proceeding.

Identity of issues is established both from the findings of fact (R. 79) and from the opinion of the Court below (R. 447), wherein the Court stated with reference to the criminal trial that "it is clear that the government relied upon the same facts as it relies on in the case at bar to establish fraud."

The conclusive character of an acquittal in a criminal case as a bar to civil action involving the collection of a

penalty based upon the facts and intents involved in the criminal case has been decided by this Court in *Coffey* v. *United States, supra.* This Court there dealt squarely with the effect of the indictment, trial and verdict of acquittal in the prior criminal action, as disclosed by the opinion itself as follows (pp. 442-443):

> "The principal question is as to the effect of the indictment, trial, verdict and judgment of acquittal set up in the fourth paragraph of the answer. The information is founded on §§3257, 3450, and 3453; and there is no question, on the averments in the answer, that the fraudulent acts and attempts and intents to defraud, alleged in the prior criminal information, and covered by the verdict and judgment of acquittal, embraced all of the acts, attempts and intents averred in the information in this suit. The question, therefore, is distinctly presented, whether such judgment of acquittal is a bar to this suit. We are of opinion that it is.
>
> "It is true that §3257, after denouncing the single act of a distiller defrauding or attempting to defraud the United States of the tax on the spirits distilled by him, declares the consequences of the commission of the act to be (1) that certain specific property shall be forfeited; and (2) that the offender shall be fined and imprisoned. It is also true that the proceeding to enforce the forfeiture against the *res* named must be a proceeding *in rem* and a civil action, while that to enforce the fine and imprisonment must be a criminal proceeding, as was held by this court in *The Palmyra,* 12 Wheat., 1, 14. Yet, where an issue raised *as to the existence of the act or fact denounced has been tried in a criminal proceeding, instituted by the United States, and a judgment of*

> *acquittal has been rendered in favor of a particular person, that judgment is conclusive in favor of such person,* on the subsequent trial of a suit *in rem* by the United States, where, as against him, the existence of the same act or fact is the matter in issue, as a cause for the forfeiture of the property prosecuted in such suit *in rem.* * * * It is urged as a reason for not allowing such effect to the judgment, that the acquittal in the criminal case may have taken place because of the rule requiring guilt to be proved beyond a reasonable doubt, and that, on the same evidence on the question of preponderance of proof, there might be a verdict for the United States, in the suit *in rem.* Nevertheless, the fact or act has been put in issue and determined against the United States; and all that is imposed by the statute, as a consequence of guilt, is a punishment therefor. There could be no new trial of the criminal prosecution after the acquittal in it; and a subsequent trial of the civil suit amounts to substantially the same thing, with a difference only in the consequences following a judgment adverse to the claimant."

The petitioner himself has recognized the force of the *Coffey* case by conceding that

> "The *Coffey* case has been discussed by this Court and its doctrine has been carefully delimited as meaning that facts ascertained in the criminal case, as between the United States and the defendant, may not be 'again re-litigated between them, *as the basis of any statutory punishment* denounced as a consequence of the existence of the facts' (italics as in original)." (Pet. Br. p. 55.)

Petitioner, however, confuses the true doctrine of the *Coffey* case, as is shown by his contention that its applicability in the field of *res judicata* was definitely rejected by this Court in *Murphy* v. *United States, supra,* (Pet. Br. 55). This Court did not so reject the *Coffey* case in the *Murphy* case.

No useful purpose is served by considering in detail whether or not the application of the *Coffey* case has been limited or rejected as to features not here involved.

As heretofore pointed out, the true distinction between the situation in the *Coffey* case and that which prevailed in the *Murphy* case, the *Stone* case, the *Warner Brothers Pictures* case, and the *Donaldson-Shultz* case, is that in these last four cases no question of criminal intent was involved in the second civil proceeding. This Court, therefore, quite properly decided that a verdict or judgment based upon issues involving criminal intent could not be *res judicata* in proceedings not involving that vital issue. The Court or jury might have found in favor of the Government on all the issues save that of criminal intent, with a resulting acquittal in the first trial, whereas with this issue absent in the second proceeding the Government might prevail. Recognizing this difference in the *Stone* case, this court said (p. 187):

> "The present action is unlike that against *Coffey*. This is not a suit to recover a penalty, to impose a punishment, or to declare a forfeiture. The only relief sought here is a judgment for the value of property wrongfully converted by the defendant."

The question of criminal intent was completely lacking in the second *Stone* proceeding.

In the present case, however, the existence of criminal intent is as essential to the imposition of the fifty per centum addition to the deficiency as it was in the criminal proceeding. This is the all important factor which makes the doctrine of the *Coffey* case applicable and distinguishes all the arguments and decisions submitted by petitioner in opposition.

Petitioner argues at length that the issue of fraud involved in Section 293(b) was not an issue in the criminal prosecution under Section 146(b), and cites *United States* v. *Scharton,* 285 U. S. 518. The *Scharton* case came up on a motion to quash the indictment because the offenses were committed more than three years prior to the return of the true bill. A three-year Statute of Limitations applied except for offenses in fraud of the United States, in which event the period was fixed at six years. This Court held that under the statute it would be sufficient to plead and prove a wilful attempt to evade or defeat, and that an averment of fraud would be surplusage.

Petitioner's reasoning therefrom is wholly fallacious. Accepting his construction of Section 146(b) and ignoring the express language of the indictment against respondent, which charged a wilful and fraudulent attempt to evade, petitioner must at least concede that the criminal charge involved a wilfull attempt in some manner to evade, a tax. "Wilful" implies a knowledge, a direction and a planning of the act committed. A wilful attempt requires an intention to do the act. Under every legal test a wilful act done with intention to evade, would be frandulent. It may not be fairly argued that the language of Section 293(b)

does not embrace all the elements of Section 146(b). It may be that in an indictment drawn under Section 146(b) an allegation of fraud is not required, even though fraud is implicit in the section. See *United States* v. *Murdock*, 290 U. S. 389, in which this Court, passing upon the question of whether the word "wilful" as used in Section 146(a) implied bad faith or evil intention, said:

> "The respondent's refusal to answer was intentional and without legal justification, but the jury might nevertheless find that it was not prompted by *bad faith or evil intent, which the statute makes an element of the offense.*" (Italics ours.)

Petitioner's argument is in effect that respondent could have been tried and convicted under Section 146(b), without there being present any element of bad faith, evil intent or fraud. The mere statement of such a proposition should carry its own refutation.

Nor does the fact that the consequences of the two proceedings might be different affect the finality of the adjudication where the issues are identical. Upon a showing, as here, that the parties and issues are identical, it matters not that the consequences of one proceeding would possibly be imprisonment and fine, and in the other a monetary penalty. The only case cited by petitioner on this phase of his argument (*Ash Sheep Co.* v. *United States*, 252 U. S. 159), does not support his theory. There the Equity Court in the first proceeding had refused to entertain the question of penalties, and so there was no previous adjudication, and no estoppel against pursuing the collection of penalties in any appropriate proceeding.

The true ground for the decisions in *Burt* v. *Union Central Life Ins. Co.*, 187 U. S. 362, and *Schindler* v. *Royal Ins. Co.*, 258 N. Y. 310, was lack of identity of parties.

Although petitioner refers to a slight difference in evidence he concedes that

> "the test is not whether the evidence is the same in the two proceedings but whether the issue was identical" (Pet. Br. p. 59).

The issues being identical, immaterial variations in the evidence are of no importance.

Petitioner further argues that because the *quantum* of proof required in a criminal prosecution is different from that required here, respondent's acquittal is no bar to petitioner's recovery of the addition to the deficiency in this proceeding. This argument was urged upon this Court in the *Coffey* case, but inasmuch as the same parties and same issues were present in both proceedings, the degree of proof supporting the judgment was not permitted to nullify its effect.

This rule is consistent with the principles which have been applied in declaring the effect to be given to judgments previously obtained between the same parties on the same issues. Thus a judgment obtained in one state between the same parties upon the same issues is entitled to full faith and credit in another state despite the fact that, because of certain rules (either substantive or procedural) prevailing in such other state, a contrary result might have been obtained had suit originally been commenced in the other state (*Kenney* v. *Supreme Lodge of the World, Royal Order of Moose*, 252 U. S. 411; *Sistare* v. *Sistare*, 218 U. S. 1; *Fauntleroy* v. *Lum*, 210 U. S. 230).

In *Kenney* v. *Supreme Lodge, etc., supra*, an action of debt was brought in Illinois upon a judgment recovered in Alabama. The defendant plead to the jurisdiction that the judgment was for negligently causing the death of the plaintiff's intestate in Alabama, and that a statute of Illinois provided that no action should be brought in that state for damages occasioned by death occurring in another state in consequence of wrongful conduct. The plaintiff demurred to the plea. The Supreme Court of Illinois held that because of the statute the original action could not have been brought in Illinois and that, therefore, its courts had no jurisdiction of the suit upon the judgment. This Court reversed, holding that, even though the action could not have been brought originally in Illinois, the Alabama judgment was entitled to full faith and credit.

In *Fauntleroy* v. *Lum, supra*, a judgment was rendered in Missouri upon a cause of action, arising on happenings in Mississippi, which would not have warranted suit in the latter state. Nevertheless, this court held that the courts of Mississippi were bound to enforce the Missouri judgment even though the original cause of action not only could not have been maintained there, but was actually illegal and void.

In reason no difference in the *quantum* of proof essential to sustain the burden should limit or prevent the application of *res judicata*, whether the issue may be proven by a mere preponderance or must be supported by clear and convincing evidence or by proof beyond a reasonable doubt. Whether the requisite volume is less or more in one case than in another, it is nonetheless true that the party selecting the proceeding deliberately and on his own ini-

tiative tendered the issue in the chosen proceeding; that he came to trial with full knowledge that the burden rested on him of establishing his charge by a certain volume of proof applicable to the proceeding of his choice; that he voluntarily brought forward his proof and deposited it in his side of the balances which by his own selection were to receive and weigh whatever he might furnish; and that he had every opportunity to know in advance the exact effect of his proof upon the scales chosen and to estimate the probable effect on the same scales of his opponent's proof. Why under such circumstances should not the resulting judicial determination of that issue be as conclusive as if made in a proceeding in which the burden was a lesser one? Why should he be allowed to say "I will use this proceeding in the first instance for the possible advantage of imposing a criminal punishment, but if I fail I will then proceed by establishing the same facts and endeavor to collect the tax and impose a penalty because of fraud in a civil case where I probably will have a better chance to prevail"? And why, if the government wanted the benefit of the easier method of establishing its charge so as to lessen the risk of failure, should it not be compelled to elect and use that kind of procedure in which a mere preponderance, or clear and convincing evidence would have sufficed to prevail upon the issue?

Petitioner says that the Government's right to collect its revenue should not be determined by the technique of the gaming table (Pet. Br. p. 60). To this we agree. But there is no element of "gambling" in the mere obligation to face the recognized doctrine of election of remedies and the prohibition against double jeopardy. Not infrequently a

lawyer has a choice, as between courts of different states, of the one in which he will commence an action, or he may have a choice as between staying in a state court or removing to a federal court. In such a case the careful practitioner will look up the law, both substantive and procedural as declared in each jurisdiction, to determine which affords him the better chance of recovery or defense as the case may be. On such an investigation he often finds a conflict as between the declared law of the respective jurisdictions, and after study he chooses the forum that seems to afford him the better chance to prevail. Occasionally one forum would deny him recovery on his available facts, while another would allow it.

Suppose a careless lawyer without adequate investigation had sued in a court in which he was denied recovery, on facts which might have warranted recovery in another available jurisdiction; that, after such failure, he sues again in the other available court; and that the defendant pleads in bar of this second suit the prior determination in the earlier case. May the plaintiff then successfully urge against the plea, that he lost in the earlier court only because of an unfavorable rule of law in that court? If no question of public policy were involved, or perhaps even if it were, is it not clear that full faith and credit should be given the earlier judgment and that it would defeat the later suit and preclude a retrial of the issue theretofore conclusively determined?

By way of concrete example, Massachusetts has no statutory prohibition which prevents a claimant against an estate from testifying as to a personal conversation with the deceased, whereas such a statute prevails in New York.

Let us assume that a creditor privileged to sue either in New York or Massachusetts on a claim against estate representatives sues in New York; that his only testimony to establish his claim is his own and because he is disqualified under the New York statute he fails to prove his case by competent proof and judgment goes against him. He then sues upon the same claim in Massachusetts where he is a competent witness to prove the claim. The New York judgment is plead as barring the Massachusetts suit. Is it not plain that the application of the full faith and credit doctrine would so bar it? Is it not plain that in every conflict of law (whether substantive in nature of procedural or evidential), as between different jurisdictions, an adverse final judgment in a suit in the jurisdiction whose view of the law was unfavorable to recovery would be a conclusive prior determination so as to prevent a retrial of the same issue in a suit subsequently brought in the forum where the law might have permitted a recovery in the first instance?

Finally the government argues that the application of the doctrine of *res judicata* would force it to elect between the civil and the criminal proceeding. This does not follow except in so far as a double punishment might thereby be imposed. If a criminal proceeding were brought, regardless of its outcome, the government could still assess the tax. Respondent does not question this and this is the extent of the holding in the *Donaldson-Schultz* case cited by petitioner in support of his contention (Pet. Br. p. 63). If petitioner believes that his proof would not justify a criminal prosecution, a civil procedure is available to him. But petitioner cannot ask the support of this court to establish a doctrine which would permit him upon insufficient

proof to bring a criminal prosecution for purposes completely unrelated to his duties as a collector of the revenue, and upon failure of that action again to seek to collect not only the tax but as well the penalty thereon in a later civil proceeding. Were such a procedure sanctioned petitioner might, without fear of any adverse consequence, formulate a policy of proceeding by criminal action in every tax case, to gain thereby whatever benefit might result to the Government from a general disposition on the part of persons threatened with charges of crime and with a criminal trial, to make their peace at any cost regardless of the fact that there might be a real legal question as to the taxability of the items in question. The revenue which petitioner argues so vigorously must be safeguarded, is adequately safeguarded by the existing statutes providing for its collection and for the imposition of punishment in certain cases. Is not the taxpayer also entitled to the protection of his constitutional rights under the age old doctrine of former adjudication?

Application of Argument

Respondent's 1929 income tax return was filed March 15, 1930 (R. 52). On its face it disclosed a claim of a deductible loss of $1,351,875.77 as experienced upon the sale of 18,300 shares of bank stock and that claimed loss wiped out all the income otherwise reported (R. 698-699).

From that date forward the government was bound to know that fact. The very size of the deduction invited examination. The government was bound to examine that return and determine what it conceived to be the proper

tax thereon not later than March 15, 1932. But it could make that examination at any time and if the examination indicated to it a need therefor it could pursue any one or more of the various remedies, criminal or civil, that might be proper under the law. The statutes affording such remedies—beyond those referred to in petitioner's brief—are set forth in an appendix to this brief.

If the government resorted to civil proceedings before March 16, 1932 the question of fraudulent evasion would not affect the recovery of the true tax as such. In that event it could only affect the fifty per centum penalty; and even as to the latter, the question would be an open issue, triable as such, unless cut off by former jeopardy or prior judicial determination. Neither of these bars could intervene, if, regardless of the order in which the criminal or civil proceedings might be brought, the government brought its civil proceedings to an earlier final determination.

The government was bound to know the law. The choice of procedure lay with it, not with the respondent. It made that choice deliberately. If it could have prevailed in the criminal proceeding which it first brought to trial, respondent might have been serving a prison sentence. That the government was defeated does not prevent the consequences of that trial and acquittal as provided by the constitution and by the law. The government is not above either. It may not both eat and keep its cake. Even as against the government, the citizen is entitled to the protection that is his under the law and the constitution.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

WILLIAM WALLACE,
Of Counsel for Respondent.

Dated, January 5, 1938.

APPENDIX

REVENUE ACT OF 1928:

SEC. 275. PERIOD OF LIMITATION UPON ASSESSMENT AND COLLECTION.

Except as provided in section 276—

(a) General rule.—The amount of income taxes imposed by this title shall be assessed within two years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

SEC. 276. SAME-EXCEPTIONS.

(a) False return or no return.—In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * *

(c) Collection after assessment.—Where the assessment of any income tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court, but only if begun (1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

SEC. 277. SUSPENSION OF RUNNING OF STATUTE.

The running of the statute of limitations provided in section 275 or 276 on the making of assessments and the beginning of distraint or a proceeding in court for collection, in respect of any deficiency, shall (after the mailing of a notice under section 272[a]) be suspended for the period during which the Commissioner is prohibited from making the assessment or beginning distraint or a proceeding in court (and in any event, if a proceeding in respect of the deficiency is placed on the docket of the Board, until the decision of the Board becomes final), and for 60 days thereafter.

* * * *

SEC. 272. PROCEDURE IN GENERAL.

(a) Petition to Board of Tax Appeals.—If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the taxpayer may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * *

SUPREME COURT OF THE UNITED STATES.

No. 324.—October Term, 1937.

Guy T. Helvering, Commissioner of Internal Revenue, Petitioner, *vs.* Charles E. Mitchell.	On Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 7, 1938.]

Mr. Justice Brandeis delivered the opinion of the Court.

Revenue Act of 1928, c. 852, Sec. 293, 45 Stat. 791, provides, in dealing with assessment of deficiencies in income tax returns:

"(b) *Fraud.*—If any part of any deficiency is due to fraud with intent to evade tax, then 50 per centum of the total amount of the deficiency (in addition to such deficiency) shall be so assessed, collected and paid. . . ."

The question for decision is whether assessment of the addition is barred by the acquittal of the defendant on an indictment under Section 146 (b) of the same Act for a wilfull attempt to evade and defeat the tax.

The Commissioner of Internal Revenue found that Charles E. Mitchell of New York had, in his income tax return for the year 1929, fraudulently deducted from admitted gross income an alleged loss of $2,872,305.50 from a purported sale of 18,300 shares of National City Bank stock to his wife; that he had fraudulently failed to return the sum of $666,666.67 received by him as a distribution from the management fund of the National City Company, of which he was chairman; and that these fraudulent acts were done with intent to evade the tax. On December 8, 1933, the Commissioner notified Mitchell that there was a deficiency in his tax return of $728,709.84 and, on account of the fraud, a 50 per cent. addition thereto in the sum of $364,354.92.

Mitchell appealed to the Board of Tax Appeals, which sustained the Commissioner's determination. 32 B. T. A. 1093. Upon a petition for review, the Circuit Court of Appeals concluded that there was ample evidence to support the Board's findings that Mit-

chell had fraudulently made deduction of the loss and that he had fraudulently failed to return the amount received from the management fund; and that, despite the facts hereafter stated, the Board was free to find the facts according to the evidence. It accordingly affirmed the assessment of the deficiency of $728,709.84. But it reversed the Board's approval of the additional assessment of $364,354.92, because of the following facts:

Before the deficiency assessment was made Mitchell had been indicted in the federal court for southern New York under Section 146 (b) of the Revenue Act of 1928, which provides:

"Any person . . . who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than 5 years, or both, together with the costs of prosecution."

The first count charged that Mitchell "unlawfully, wilfully, knowingly, feloniously, and fraudulently did attempt to defeat and evade an income tax of, to wit, $728,709.84, upon his net income for 1929." He was tried on the indictment and acquitted on all the counts. The item of $728,709.84 set out in the first count is the same item as that involved in the deficiency assessed; and both arose from the same transactions of Mitchell. But the addition of $364,354.92 by reason of fraud was not involved in the indictment.

The Circuit Court of Appeals held that the prior judgment of acquittal was not a bar under the doctrine of *res judicata;* and hence it affirmed the assessment of the $728,709.84. But it held that our decisions in *Coffey* v. *United States,* 116 U. S. 436, and *United States* v. *La Franca,* 282 U. S. 568, required it "to treat the imposition of the penalty of 50 percent as barred by the prior acquittal of Mitchell in the criminal action." 89 F. (2d) 873. Mitchell's petition for certiorari to review so much of the judgment as upheld the assessment of the deficiency of $728,709.84 was denied. 302 U. S. —. The Commissioner's petition to review so much of the judgment as denied the 50 per centum in addition was granted, because of the importance in the administration of the revenue laws of the questions presented and alleged conflict in decisions. 302 U. S. —.

First. Mitchell contends that the claim for the 50 percent is barred by the doctrine of *res judicata.* He asserts that all the facts

and intents requisite to the imposition of the 50 per centum addition to the deficiency were put in issue and determined against the Government in the criminal trial, and that hence, under the doctrine of *res judicata* the judgment of acquittal bars it from obtaining a second judgment based upon the same facts and intents. Since this proceeding to determine whether the amount claimed is payable as a tax is a proceeding different in its nature from the indictment for the crime of wilfully attempting to evade the tax, the contention that the doctrine of estoppel by judgment applies rests wholly on the assertion that the issues here presented were litigated and determined in the criminal proceeding. Compare *Tait* v. *Western Maryland Ry.*, 289 U. S. 620, 623. But this is not true.

The difference in degree of the burden of proof in criminal and civil cases precludes application of the doctrine of *res judicata*. The acquittal was "merely . . . an adjudication that the proof was not sufficient to overcome all reasonable doubt of the guilt of the accused." *Lewis* v. *Frick*, 233 U. S. 291, 302. It did not determine that Mitchell had not wilfully attempted to evade the tax. That acquittal on a criminal charge is not a bar to a civil action by the Government, remedial in its nature, arising out of the same facts on which the criminal proceeding was based has long been settled. *Stone* v. *United States*, 167 U. S. 178, 188; *Murphy* v. *United States*, 272 U. S. 630, 631, 632. Compare *Chantangco* v. *Abaroa*, 218 U. S. 476, 481, 482.[1] Where the objective of the subsequent action likewise is punishment, the acquittal is a bar, because to entertain the second proceeding for punishment would subject the defendant to double jeopardy; and double jeopardy is precluded by the Fifth Amendment whether the verdict was an acquittal or a conviction. *Murphy* v. *United States*, 272 U. S. 630, 632.

The Government urges that application of the doctrine of *res judicata* is precluded also by the difference in the issues presented in the two cases; that although the indictment and this proceeding arise out of the same transactions and facts, the issues in them are not the same; that on the indictment the issue was whether Mit-

[1] United States v. Warner Bros. Pictures, Inc., 13 F. Supp. 614 (E. D. Mo.), affirmed on other grounds, 298 U. S. 643; United States v. Donaldson-Schultz Co., 148 Fed. 581 (C. C. A. 4); United States v. Schneider, 35 Fed. 107 (C. C. D. Ore.); Sanden v. Morgan, 225 Fed. 266, 268-69 (S. D. N. Y.)

chell had "willfully" attempted to "evade or defeat" the tax; that whether he had done so "fraudulently" was not there an issue, *United States* v. *Sharton*, 285 U. S. 518; compare *United States* v. *Murdock*, 290 U. S. 389, 397; and that in this proceeding the issue is specifically whether the deficiency was "due to fraud". Compare *Burton* v. *United States*, 202 U. S. 344, 380. Since there was not even an adjudication that Mitchell did not wilfully attempt to evade or defeat the tax, it is not necessary to decide whether such an adjudication would be decisive also of this issue of fraud. Compare *Hanby* v. *Commissioner*, 67 F. (2d) 125, 129.

Second. Mitchell contends that this proceeding is barred under the doctrine of double jeopardy because the 50 per centum addition of $364,354.92 is not a tax, but a criminal penalty intended as punishment for allegedly fraudulent acts. Unless this sanction was intended as punishment, so that the proceeding is essentially criminal, the double jeopardy clause provided for the defendant in criminal prosecutions is not applicable.

1. In assessing income taxes the Government relies primarily upon the disclosure by the taxpayer of the relevant facts. This disclosure it requires him to make in his annual return. To ensure full and honest disclosure, to discourage fraudulent attempts to evade the tax, Congress imposes sanctions. Such sanctions may confessedly be either criminal or civil. As stated in *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320, 339:

"In accord with this settled judicial construction the legislation of Congress from the beginning, not only as to tariff but as to internal revenue, taxation and other subjects, has proceeded on the conception that it was within the competency of Congress, when legislating as to matters exclusively within its control, to impose appropriate obligations and sanction their enforcement by reasonable money penalties, giving to executive officers the power to enforce such penalties without the necessity of invoking the judicial power."

Congress may impose both a criminal and a civil sanction in respect to the same act or omission; for the double jeopardy clause prohibits merely punishing twice, or attempting a second time to punish criminally, for the same offense. The question for decision is thus whether Section 293 (b) imposes a criminal sanction. That question is one of statutory construction. Compare *Murphy* v. *United States*, 272 U. S. 630, 632.

Remedial sanctions may be of varying types. One which is characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted.[2] Forfeiture of goods or their value and the payment of fixed or variable sums of money are other sanctions which have been recognized as enforcible by civil proceedings since the original revenue law of 1789. Act of July 31, 1789, c. 5, § 36, 1 Stat. 29, 47. In spite of their comparative severity, such sanctions have been upheld against the contention that they are essentially criminal and subject to the procedural rules governing criminal prosecutions. *Passavant* v. *United States*, 148 U. S. 214; *United States* v. *Zucker*, 161 U. S. 475; *Hepner* v. *United States*, 213 U. S. 103; *Oceanic Steam Navigation Co.* v. *Stranahan*, 214 U. S. 320; *Chicago, B. & Q. Ry.* v. *United States*, 220 U. S. 559, 578; *United States* v. *Regan*, 232 U. S. 37; *Grant Bros. Construction Co.* v. *United States*, 232 U. S. 647, 660; *Murphy* v. *United States*, 272 U. S. 630; *Various Items* v. *United States*, 282 U. S. 577; *Lloyd Sabaudo Societa* v. *Elting*, 287 U. S. 329, 334.[3]

2. The remedial character of sanctions imposing additions to a tax has been made clear by this Court in passing upon similar legislation. They are provided primarily as a safeguard for the protection of the revenue and to reimburse the Government for the heavy expense of investigation and the loss resulting from the tax-

[2] Typical of this class of sanctions is the deportation of aliens. Fong Yue Ting v. United States, 149 U. S. 698; Low Wah Suey v. Backus, 225 U. S. 460; Zakonaite v. Wolf, 226 U. S. 272; Bugajewitz v. Adams, 228 U. S. 585; Ng Fung Ho v. White, 259 U. S. 276; United States ex rel. Bilokumsky v. Tod, 263 U. S. 149. Disbarment is likewise a sanction of this type. Ex parte Wall, 107 U. S. 265. Compare also Hawker v. New York, 170 U. S. 189, 196, 199-200; Board of Trade v. Wallace, 67 F. (2d) 402, 407 (C. C. A. 7); Farmers' Livestock Commission Co. v. United States, 54 F. (2d) 375, 378 (E. D. Ill.).

[3] See also notes 7 to 13, *infra*. The distinction here taken between sanctions that are remedial and those that are punitive has not generally been specifically enunciated. In determining whether particular rules of criminal procedure are applicable to civil actions to enforce sanctions, the cases have usually attempted to distinguish between the type of procedural rule involved rather than the kind of sanction being enforced. Thus Hepner v. United States, 213 U. S. 103, 111-12, holding that a verdict may be directed for the Government, and United States v. Regan, 232 U. S. 37, 50, holding that the Government need not prove its case beyond a reasonable doubt, distinguished Boyd v. United States, 116 U. S. 616, and Lees v. United States, 150 U. S. 476, holding that the defendant could not be required to be a witness against himself, on the ground that "the guaranty in the Fifth Amendment to the Constitution against compulsory self-incrimination . . . is of broader scope than are the guaranties in Article III and the Sixth Amendment governing trials in criminal prosecutions." 232 U. S. at 50. Compare also Pierce v. United States, 255 U. S. 398, 401.

payer's fraud.[4] In *Stockwell* v. *United States,* 13 Wall. 531, 537, 551, the Court said of a provision which added double the value of the goods:

"It must therefore be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed, or purchased, instead of the single value. The act of abstracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. . . .

"The Act of 1823 was, as we have said, remedial in its nature. Its purpose was to secure full compensation for interference with the rights of the United States. . . ."[5]

3. In Sections 276 and 293 it is provided that collection of the 50 per centum addition, like that of the primary tax itself, may be made "by distraint" as well as "by a proceeding in court". If the section provided a criminal sanction, the provision for collection by distraint would make it unconstitutional.[6] Compare *Lipke* v. *Lederer,* 259 U. S. 557; *Regal Drug Corp.* v. *Wardell,* 260 U. S. 386. See also *United States* v. *Chouteau,* 102 U. S. 603, 611; *Boyd* v. *United States,* 116 U. S. 616; *Lees* v. *United States,* 150 U. S. 476; *United States* v. *La Franca,* 282 U. S. 568. That Congress provided a distinctly civil procedure for the collection of the additional 50 per centum indicates clearly that it intended a civil,

[4] Taylor *v.* United States, 3 How. 197, 210; Bartlett *v.* Kane, 16 How. 263, 274; Cliquot's Champagne, 3 Wall. 114, 145; Dorsheimer *v.* United States, 7 Wall. 166, 173; Passavant *v.* United States, 148 U. S. 214, 221. Compare McDowell *v.* Heiner, 9 F. (2d) 120 (W. D. Pa.), affirmed on opinion below, 15 F. (2d) 1015 (C. C. A. 3); Doll *v.* Evans, 7 Fed. Cas. No. 3,969 (C. C. E. D. Pa.); Stearns *v.* United States, 22 Fed. Cas. No. 13,341 (C. C.).

[5] Compare United States *v.* Claflin, 97 U. S. 546, 552-53.

[6] Even though Congress may not provide civil procedure for the enforcement of punitive sanctions, nothing in the Constitution prevents the enforcement of distinctly remedial sanctions by a criminal instead of a civil form of proceeding. Compare United States *v.* Stevenson, 215 U. S. 190, with United States *v.* Regan, 232 U. S. 37, both enforcing the sanction prescribed in 34 Stat. 898. The fact that a criminal procedure is prescribed for the enforcement of a sanction may be an indication that it is intended to be punitive, but cannot be deemed conclusive if alternative enforcement by a civil proceeding is sustained.

not a criminal, sanction. Civil procedure is incompatible with the accepted rules and constitutional guaranties governing the trial of criminal prosecutions, and where civil procedure is prescribed for the enforcement of remedial sanctions, those rules and guaranties do not apply. Thus the determination of the facts upon which liability is based may be by an administrative agency instead of a jury,[7] or if the prescribed proceeding is in the form of a civil suit, a verdict may be directed against the defendant;[8] there is no burden upon the Government to prove its case beyond a reasonable doubt,[9] and it may appeal from an adverse decision;[10] furthermore, the

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[7] Passavant *v.* United States, 148 U. S. 214; Oceanic Steam Navigation Co. *v.* Stranahan, 214 U. S. 320; Elting *v.* North German Lloyd, 287 U. S. 324, 327-28; Lloyd Sabaudo Societa *v.* Elting, 287 U. S. 329, 334; cf. Hamburg-American Line *v.* United States, 291 U. S. 420; Osaka Shosen Kaisha Line *v.* United States, 300 U. S. 98. Compare also San Souci *v.* Compagnie Francaise de Navigation A Vapeur, 71 F. (2d) 651, 653 (C. C. A. 1); Lloyd Royal Belge, S. A. *v.* Elting, 61 F. (2d) 745, 747 (C. C. A. 2); Navigazione Libera Triestina *v.* United States, 36 F. (2d) 631, 633 (C. C. A. 9); Clay *v.* Swope, 38 Fed. 396 (C. C. D. Ky.). And see cases cited in note 2, *supra*.

Administrative determination of sanctions imposed by the income tax laws has likewise been upheld. Berlin *v.* Commissioner, 59 F. (2d) 996, 997 (C. C. A. 2); McDowell *v.* Heiner, 9 F. (2d) 120 (W. D. Pa.), aff'd on opinion below, 15 F. (2d) 1015 (C. C. A. 3); Board *v.* Commissioner, 51 F. (2d) 73, 76 (C. C. A. 6); Wickham *v.* Commissioner, 65 F. (2d) 527, 531-32 (C. C. A. 8); Little *v.* Helvering, 75 F. (2d) 436, 439 (C. C. A. 8); Bothwell *v.* Commissioner, 77 F. (2d) 35, 38 (C. C. A. 10); Doll *v.* Evans, Fed. Cas. No. 3,969 (C. C. E. D. Pa.).

[8] Hepner *v.* United States, 213 U. S. 103; Four Packages *v.* United States, 97 U. S. 404, 412; Chicago, B. & Q. Ry. *v.* United States, 220 U. S. 559, 578. Compare United States *v.* Thompson, 41 Fed. 28 (C. C. S. D. N. Y.); United States *v.* Atlantic Coast Line Ry., 182 Fed. 284 (S. D. Ga.).

[9] Lilienthal's Tobacco *v.* United States, 97 U. S. 237, 265-67, 271; United States *v.* Regan, 232 U. S. 37; Grant Bros. Const. Co. *v.* United States, 232 U. S. 647, 660. Compare New York Cent. & H. R. R. R. *v.* United States, 165 Fed. 833, 839 (C. C. A. 1); Grain Distillery No. 8 *v.* United States, 204 Fed. 429 (C. C. A. 4); Pocahontas Distilling Co. *v.* United States, 218 Fed. 782, 786 (C. C. A. 4); United States *v.* Louisville & N. Ry., 162 Fed. 185 (S. D. Ala.), aff'd, 174 Fed. 1021 (C. C. A. 5); St. Louis-S. W. Ry. *v.* United States, 183 Fed. 770, 771 (C. C. A. 5); United States *v.* Illinois Cent. Ry., 170 Fed. 542, 545-46 (C. C. A. 6); Atchison, T. & S. F. Ry. *v.* United States, 178 Fed. 12, 14 (C. C. A. 8); Missouri, K. & T. Ry. *v.* United States, 178 Fed. 15, 17-18 (C. C. A. 8). Compare also Act of March 2, 1799, c. 22, § 71, 1 Stat. 627, 678; Locke *v.* United States, 7 Cranch 339, 348; Cliquot's Champagne, 3 Wall. 114, 143-44.

[10] Compare United States *v.* Claflin, 97 U. S. 546; United States *v.* Zucker, 161 U. S. 475; United States *v.* Regan, 232 U. S. 37. See also United States *v.* Baltimore & O. S. W. Ry., 159 Fed. 33, 38 (C. C. A. 6), modified, 220 U. S. 94; United States *v.* Louisville & N. Ry., 167 Fed. 306, 307-08 (C. C. A. 6); United States *v.* Illinois Cent. Ry., 170 Fed. 542, 545 (C. C. A. 6). Compare United States *v.* Sanges, 144 U. S. 310.

Similarly, if the Government is successful it may recover costs as in other civil suits. Grant Bros. Const. Co. *v.* United States, 232 U. S. 647, 665. See also United States *v.* Southern Pac. Co., 172 Fed. 909, 911 (C. C. D. Ore.); United States *v.* Minneapolis, St. P. & S. S. M. Ry., 235 Fed. 951, 952-53 (D. Minn.).

defendant has no constitutional right to be confronted with the witnesses against him,[11] or to refuse to testify;[12] and finally, in the civil enforcement of a remedial sanction there can be no double jeopardy.[13]

4. The fact that the Revenue Act of 1928 contains two separate and distinct provisions imposing sanctions, and that these appear in different parts of the statute, helps to make clear the character of that here invoked.[14] The sanction of fine and imprisonment prescribed by Section 146 (b) for wilfull attempts "in any manner to evade or defeat any [income] tax", introduced into the Act under the heading "Penalties", is obviously a criminal one. The sanction of 50 per centum addition "if any part of any deficiency is due to fraud with intent to evade tax", prescribed by Section 293 (b), introduced into the Act under the heading "Additions to the Tax", was clearly intended as a civil one. This sanction, and other additions to the tax are set forth in Supplement M, entitled "Interest and Additions to the Tax". The supplement includes, besides Section 293 (b), Sections 291, 292, 293 (a) and 294. Section 291 prescribes a 25 per centum addition for failure to make and file a return; Section 292 prescribes interest at the rate of 6 per cent. per annum upon the deficiency from the date prescribed for payment of the tax; Section 293 (a), an addition of 5 per centum if the deficiency "is due to negligence, or intentional disregard of rules and regulations but without intent to defraud"; and Section 294 prescribes an addition to the tax of 1 per centum

[11] United States *v.* Zucker, 161 U. S. 475; Grant Bros. Construction Co. *v.* United States, 232 U. S. 647, 660.

[12] Compare United States ex rel. Bilokumsky *v.* Tod, 263 U. S. 149, 155. We do not construe Boyd *v.* United States, 116 U. S. 616, or Lees *v.* United States, 150 U. S. 476, as holding to the contrary where the sanction involved is remedial, not punitive. See note 3, *supra.*

[13] Murphy *v.* United States, 272 U. S. 630; Various Items *v.* United States, 282 U. S. 577. Compare Egner *v.* United States, 16 F. (2d) 597 (C. C. A. 3); Wood *v.* United States, 204 Fed. 55, 57 (C. C. A. 4); United States *v.* St. Louis-S. W. Ry., 184 Fed. 28, 32 (C. C. A. 5); Slick *v.* United States, 1 F. (2d) 897, 898 (C. C. A. 7). See also United States *v.* Three Copper Stills, 47 Fed. 495, 499 (D. Ky.); United States *v.* Olsen, 57 Fed. 579, 582-86 (N. D. Cal.); Castle *v.* United States, 17 F. Supp. 515, 518-20 (Ct. Cl.). Compare Hanby *v.* Commissioner, 67 F. (2d) 125 (C. C. A. 4).

[14] The Board of Tax Appeals said in Mitchell *v.* Commissioner, 32 B. T. A. 1093, 1136: "A careful study of the two sections convinces us that they are basically different in character and were enacted for wholly different purposes. The language of the two sections differs widely and contemplates situations which may require entirely dissimilar proof."

per month in case of non-payment. Obviously all of these "Additions to the Tax" were intended by Congress as civil incidents of the assessment and collection of the income tax.[15]

Third. Mitchell insists that *Coffey* v. *United States,* 116 U. S. 436, requires affirmance of the judgment; the Government argues that this case is distinguishable, and, if not, that it should be disapproved. The Circuit Court of Appeals, citing *Stone* v. *United States,* 167 U. S. 178, 186-189, and later cases, recognized that the rule of the *Coffey* case "did not apply to a situation where there had been an acquittal on a criminal charge followed by a civil action requiring a different degree of proof"; but construing Section 293 (b) as imposing a penalty designed to punish fraudulent tax dodgers "and not as a mere preventive measure", it thought that the *Coffey* case and *United States* v. *La Franca,* 282 U. S. 568, required it "to treat the imposition of the penalty of 50 per cent. as barred by the prior acquittal of Mitchell in the criminal action." Since we construe Section 293 (b) as imposing a civil administrative sanction, neither case presents an obstacle to the recovery of the $364,354.92, the 50 per centum addition here in issue.

Reversed.

Mr. Justice McReynolds is of opinion that the judgment of the Circuit Court of Appeals should be affirmed.

Mr. Justice Cardozo and Mr. Justice Reed took no part in the consideration or decision of this case.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[15] Section 104 imposes a somewhat similar additional tax of 50 per cent. of the net income in the case of corporations formed or availed of for the purpose of avoiding surtax on their shareholders through improper accumulation of surplus. Compare United Business Corp. v. Commissioner, 62 F. (2d) 754 (C. C. A. 2).